No. 73-1573

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

Appellants,

VS.

DUANE LARKIN, M.D.,

Appellee.

MOTION TO DISMISS OR AFFIRM AND APPELLEE'S APPENDIX

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Appellants,

vs.

DUANE LARKIN, M.D.,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the interlocutory judgment of the United States District Court for the Eastern District of Wisconsin on the grounds that it is clear that the questions are so unsubstantial as not to warrant further argument.

THE STATE OF WISCONSIN STATUTES INVOLVED

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§ 448.02 (1)

No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term "treat the sick" is defined in s. 445.01 (1) (a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute.

§ 448.02 (4)

No person shall practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice in this or any other state, in any instance in which the examining board, after a hearing, finds that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the public as to identity or to otherwise result in detriment to the profession or the public. This subsection does not apply to a change of name resulting from marriage or divorce.

§ 448.16 (1)

Sections 448.02 to 448.08, shall not apply to commissioned physicians of the medical corps of one of the armed services or the federal health service of

the United States or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state, nor to the gratuitous prescribing and administering of family remedies or to treatment rendered in an emergency.

§ 448.17

The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

§ 448.18 (1)

"Immoral or unprofessional conduct" as used in this section mean: (a) Procuring, aiding or abetting a criminal abortion; (b) advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular, or other written or printed paper or document the curing of venereal diseases, the restoration of "lost manhood", the treatment and curing of private diseases peculiar to men or women, or the advertising or holding himself out to the public in any manner as a specialist in diseases of the sexual organs, or diseases caused by sexual weakness, self-

abuse or excessive indulgences, or in any diseases of a like nature or produced by a like cause, or the advertising of any medicine or any means whatever whereby the monthly periods of women can be regulated or the menses reestablished, if suppressed, or being employed by or in the service of any person, or concern, actual or pretended so advertising; (c) the obtaining of any fee; or offering to accept a fee on the assurance or promise that a manifestly incurable disease can be or will be permanently cured; (d) wilfully betraying a professional secret; (e) indulging in the drug habit; (f) conviction of an offense involving moral turpitude; (g) engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public.

§ 448.18 (2)

(2) Upon verified complaint in writing to the district attorney charging the holder of a license or certificate of registration from the examining board or chiropractic examining board with having been guilty of immoral or unprofessional conduct or with having procured his certificate or license by fraud or perjury, or through error, the district attorney shall bring civil action in the circuit court against the holder and in the name of the state as plaintiff to revoke the license or certificate. The court may appoint counsel to assist the district attorney and either party may demand a jury. No one shall be privileged from testifying fully or producing evidence, but he shall not be prosecuted or subject to penalty on account of anything about which he so does, except for perjury in so doing. If the court or the jury finds for the plaintiff, judgment shall be rendered revoking or suspending the license

or certificate and the clerk of the court shall file a certified copy of the judgment with the examining board or the chiropractic examining board. The costs shall be paid by the county, but if the court determines that the complaint made to the district attorney was wilful and malicious and without probable cause, it shall enter judgment against the person making the complaint for the costs of the action, and payment of the same may be enforced by execution against the body as in tort actions.

(3) When any person licensed or registered by the examining board is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the examining board a certified copy of the information and of the verdict and judgment, and upon such filing the examining board shall revoke or suspend the license or certificate. The examining board shall also revoke or suspend any such license or certificate upon satisfactory proof being made of the conviction of such license or certificate holder in a federal court of a crime committed in the course of his professional conduct. The action of the examining board in revoking or suspending such license or certificate may be reviewed under ch. 227.

§ 448.18 (7)

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a

license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227.

§ 448.23 (1)

448.23 Fee splitting between physicians and others.

(1) SEPARATE BILLING REQUIRED. Any physician who renders any medical or surgical service or assistance whatever, or gives any medical, surgical or any similar advice or assistance whatever to any patient, physician, corporation, or to any other institution or organization of any kind, including a hospital, for which a charge is made to such patient receiving such service, advice or assistance, shall render an individual statement or account of his charges therefor directly to such patient, distinct and separate from any statement or account by any physician or other person, who has rendered or who may render any medical, surgical or any similar service whatever, or who has given or may give any medical, surgical or similar advice or assistance to such patient, physician, corporation, or to any other institution or organization of any kind, including a hospital.

§ 448.23 (2)

(2) PHYSICIAN PARTNERSHIPS PERMITTED. Notwithstanding any other provision in this section, it is lawful for 2 or more physicians, who have entered into a bona fide partnership for the practice of medicine, to render a single bill for such services in the name of such partnership.

QUESTION PRESENTED FOR REVIEW

Did the United States District Court for the Eastern District of Wisconsin abuse its discretion when, sitting as a three-judge court, it entered an interlocutory injunction preventing the appellants from engaging in a hearing to suspend the license of the appellee to practice medicine in the State of Wisconsin for six (6) months when the persons who would be the judges at the hearing were the very same persons who personally investigated the charges and had determined that the appellee had violated some laws regulating medicine and that there was probable cause to believe that the appellee had violated the provisions of the laws regulating the medical practice in Wisconsin, thus making the appellants the judges of the charges which they had investigated and brought?

STATEMENT OF THE CASE

Although this case on paper commenced on July 6, 1973, it has its genesis in the stormy litigation in Wisconsin surrounding the practice of abortion.

In 1970, a three-judge court sitting in the Eastern District of Wisconsin declared the Wisconsin abortion statute unconstitutional. *Babbitz* v. *McCann,* 310 F.Supp. 293 (E. D. Wis. 1970), vac. on other grounds, 402 U.S. 903 (1971). That decision triggered a wave of resistance and a concerted effort by the Attorney General of Wisconsin, the District Attorney in Milwaukee County, the District Attorney in Dane County (Madison) and these appellants to defy the decision of the United States District Court by threatening all members of the medical profession who engaged in the practice of abo tion. The officials of the State of Wisconsin were so successful in their effort that only two doctors engaged in administering abortions in a public manner, Dr. Alfred Kennan in Madison, Wisconsin and Dr. Duane Larkin, the appellee here, in Milwaukee, Wisconsin. The litigation surrounding Dr. Kennan was first to follow the *Babbitz* decision.

Initially the District Attorney of Dane County, Mr. Nichol, commenced a criminal action against Dr. Kennan. That action was thwarted by the United States District Court for the Western District of Wisconsin and subsequently by a three-judge court sitting there. *Kennan* v. *Nichol,* 326 F.Supp. 613 (1971) *aff'd.,* 404 U.S. 1055 (1971). However, the authorities of Wisconsin were not persuaded to abate their conduct as a result of the decision in the Madison case. The Attorney General in concert with these appellants, commenced an action against Dr. Kennan which threatened his license to practice medicine. Again, the

federal court in Madison, Wisconsin restrained those activities. See *Kennan* v. *Warren,* 328 F.Supp. 525 (1971). Finally, a circuit court judge in Dane County proceeded on his own to attempt to stop Dr. Kennan and, that judge had to be restrained by Judge Doyle. *Ibid.*

The history of the litigation in Milwaukee with respect to Dr. Larkin is similar. However, most of his cases are not reported. In December of 1971, Judge Myron L. Gordon entered a restraining order preventing enforcement of the Wisconsin abortion statute against Dr. Larkin. *Larkin* v. *McCann, et al,* No. 71-C-671 (E.D. Wis.). While the motion for a preliminary injunction was pending, the Attorney General of Wisconsin commenced an action in Madison, Wisconsin against Dr. Larkin for declaratory relief and obtained abatement of the federal court proceedings pursuant to 28 U.S.C. § 2284(5). The litigation continued there until the entry of Mary Carpenter Bruce. Mrs. Bruce commenced an action in the Circuit Court of Milwaukee, Wisconsin against Dr. Larkin to abate a public nuisance. During the course of those proceedings, which were removed to federal court and then remanded back to the state court,[1] Mrs. Bruce was successful in obtaining a restraining order from a Circuit Court judge. Dr. Larkin commenced an action in the federal court against this Circuit judge and, during the pendency of that action, the Circuit judge withdrew his restraining order. Dr. Larkin also commenced an action in the federal court against Mary Carpenter Bruce and, Judge Myron Gordon held that that case stated a cause of

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[1] *State ex rel. Bruce* v. *Larkin,* 346 F.Supp. 1065 (E.D. Wis. 1972).

action. See *Larkin* v. *Bruce,* 352 F.Supp. 1076 (E.D. Wis. 1972). Thus, in both Madison and Milwaukee, the two abortion clinics were hounded by the Attorney General, the local District Attorney, and a local state Circuit Court judge. At the time of the abortion decisions of the United States Supreme Court, the only group who had not participated in Milwaukee who had participated in Madison was the State Medical Examining Board, the appellants in this case. They went after Dr. Larkin after the abortion decisions of the United States Supreme Court.

On June 20, 1973, the appellant, Thomas W. Tormey, Jr., M.D., acting on behalf of all of the other appellants, executed a Notice of Investigative Hearing which stated that the Board would "determine whether [Dr. Larkin] has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public." The Notice stated further:

> "Based on the evidence adduced at said investigative hearing the Medical Examining Board will determine whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes."

Service was attempted upon the appellee.[2] Shortly after

[2] Dr. Larkin has never been served with any documents by personal service. Sec. 227.08, Wis. Stats. authorizes agencies to adopt rules for the service of notices and for the conduct of all of its hearings. The Medical Examining Board has never promulgated any rules whatsoever to govern the proceedings involved in this case. Thus, there is no provision within the regulatory agency involved for substituted service of any nature. Paragraph 2(c) of the Second Cause of Action of the Amended Complaint alleges the constitutional depravation due to the fact that the Board does not have any rules.

receiving a copy of the Notice, Dr. Larkin commenced this action in the United States District Court for the Eastern District of Wisconsin. A Motion for a Temporary Restraining Order was denied and this investigative hearing commenced on July 12, 1973. On that same date, Dr. Larkin filed an Amended Complaint. In the Second Cause Action, Dr. Larkin challenged the constitutional validity of the Wisconsin statutory scheme in Paragraphs 2 and 3 as follows:

> "2. The proceedings of the Medical Examining Board as instituted against the plaintiff and as authorized by Chapter 448, Wis. Stats., a copy of which is attached hereto as Exhibit D, are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution in that:
>
> (a) The phrases "inimical to the public health", "conduct unbecoming a person licensed to practice medicine" and "conduct detrimental to the best interests of the public" are vague, overly broad and cause men of reasonable intelligence to guess as to their meaning and effect thereby depriving the plaintiff of notice of prohibited practices as well as providing the defendants with authority to investigate and warn, reprimand or institute criminal actions for activities of the plaintiff which are protected by the Constitution of the United States of America.
>
> (b) The Notice of Investigative Hearing, Exhibit B, states that at the conclusion of the hearing the Board will determine whether to warn or reprimand the plaintiff or whether the Board will institute criminal actions or actions to revoke license if they conclude that probable cause exists and, said notice prohibits the plaintiff and his at-

torney from cross examining any of the witnesses against him and from in any way appearing in these hearings in a meaningful fashion thereby subjecting the plaintiff to punishment and official condemnation without being afforded his right to be confronted by the witnesses against him, without being afforded his right to notice of the nature of the charges against him, without being afforded the opportunity to produce witnesses on his behalf, without being afforded the compulsory process for witnesses, and without being afforded a trial by jury or by persons other than his accusers, all in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(c) The Medical Examining Board of the State of Wisconsin has not promulgated any rules with respect to the conduct of these proceedings. Thus, the proceedings will be regulated on an *ad hoc* basis in violation of due process of law because there are no rules to determine what process is due the plaintiff.

(d) The Notice of Investigative Hearing states that a criminal action will be brought against the plaintiff if the Board finds probable cause under the criminal statutes of the State of Wisconsin. This proceeding denies to the plaintiff the right to have a determination of probable cause made by an impartial, neutral, independent and detached judicial officer or by a grand jury, in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. These proceedings as embodied in the Notice of Investigative Hearing are brought pursuant to authority which appears in Sec. 448.17 and 448.18, Wis.

> Stats. These statutes authorize the Board to warn, reprimand, determine probable cause, *suspend a license,* and *temporarily suspend a license* and, such statutory scheme is in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution as more particularly set forth in the preceding paragraph." (Emphasis supplied).

The Amended Complaint in its request for relief at ¶5 asked for a Temporary Restraining Order and a Preliminary Injunction in the case.

At the time of the filing of the Amended Complaint, the appellants were only investigating the appellee and, on each and every occasion where they had an opportunity to do so, they assured the United States District Court for the Eastern District of Wisconsin that any effort to remove the license of Dr. Larkin, either permanently or temporarily, would only be done in a judicial proceeding and would not be done by these appellants. The counsel for the appellants repeatedly compared the activities of the appellants to a grand jury. See Appellant's briefs filed in District Court.

At Page 1 of the appellants' Reply Brief in support of their Amended Motions to Dismiss, the appellants stated the following:

> "The Medical Examining Board is not authorized to indict, but must go to the District Attorney to seek prosecution or action to revoke *or suspend* the license of one of its licensees." (Emphasis supplied).

At Page 3 of that same brief, the appellants made the following statement to the federal court:

> "The obvious distinction is that in the present case the Medical Examining Board is conducting an inves-

tigative hearing and not a contested hearing. *Any contested hearing will be held before a court and/or jury.*" (Emphasis supplied).

At Pages 5 and 6 of that same brief, the appellants stated that any revocation proceedings would be "steeped in due process provisions."

In that posture and with those assurances regarding the procedure being employed against Dr. Larkin, the United States District Court for the Eastern District of Wisconsin repeatedly denied requests for preliminary injunctive relief.

The proceedings against Dr. Larkin with respect to the so-called investigative hearing were held on July 12 and 13, 1973, and were continued on October 4, 1973. Between July 13, 1973 and October 4, 1973, and, on September 18, 1973, the appellants, acting pursuant to Sec. 448.18 (7), Wis. Stats., completely changed their posture and issued a Notice of Contested Hearing against Dr. Larkin. The Board scheduled the contested hearing for the afternoon of October 4, 1973. Thus, the contested hearing was directed to take place at the conclusion of the investigative hearing. The issues involved in the contested hearing were identical to the issues which had been investigated by the Board. They were concerned with:

1. Whether Dr. Larkin practiced medicine under a different name than the one which appears on his license;

2. Whether Dr. Larkin allowed an unlicensed physician to practice medicine at his clinic;

and

3. Whether Dr. Larkin split fees with other persons.[3]

[3] This Notice of Contested Hearing was served in the same improper manner as the original Notice.

On September 20, 1973, the appellee filed a copy of the Notice of Contested Hearing with the United States District Court with an accompanying letter. Counsel for the appellants have received all documents and letters referred to herein. In the accompanying letter, the appellee stated the following:

> "The present posture of the proceedings is a classic example of violations of due process of law. The so-called investigation was conducted by the defendants. Before that investigation is completed, the same defendants bring charges against the plaintiff and are his accusers. The judge and jury of the charges are the same people who preferred them. At the conclusion of the hearing, his accusers and judges will then pass sentence upon him. Thus, the procedure violates most known tenets of due process of law. (Citing cases).
>
> "We now ask the court for an immediate restraining order to prevent irreparable harm which is being threatened against Dr. Larkin in violation of the constitution of the United States."

On September 26, 1973, the appellee filed another Motion for Temporary Restraining Order and Interlocutory Injunction. That Motion focused upon the contested hearing which was scheduled to commence on October 4, 1973 and incorporated as grounds the positions "more fully set forth in the affidavits and briefs previously filed herein." The letter accompanying the Motion to Judge Gordon, a copy of which was sent to counsel for the appellants, stated the following:

> "Enclosed is a Motion for Temporary Restraining Order and Interlocutory Injunction which specifically focuses upon the latest maneuver by the defendants

whereby they are attempting to suspend Dr. Larkin's license pursuant to the provisions of Sec. 448.18 (7), Wis. Stats. The Amended Complaint in the case generally challenged the validity of Sec. 448.18, and Paragraph 2(b) in conjunction with Paragraph 3 of the Second Cause of Action specifically challenged the constitutionality of the Board to invoke Sec. 448.18 (7) to temporarily suspend the license without being afforded a trial by jury or by persons other than his accusers, *inter alia.*"

In a decision dated October 1, 1973, the Honorable Myron L. Gordon ordered the entry of a Temporary Restraining Order. The court detailed the history of the proceedings and noted that the action by the Board in pursuing a contested hearing changed the proceedings "radically." The court summed up the situation which it was facing as follows:

"The plaintiff, a licensed physician who performs abortions in this state, brought this action against the members of the state medical examining board for injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

"The complaint alleged that an investigative hearing had been initiated concerning Dr. Larkin, but that the notice thereof failed to disclose any specific allegations of misconduct. It was further alleged, upon information and belief, that the investigation was launched in order to punish the plaintiff for performing abortions.

"A motion for a temporary restraining order, filed with the complaint, was denied. I concluded that the plaintiff's complaint was insufficient to justify interference with the examining board's attempt to perform

its statutory investigative duty. The plaintiff was given the opportunity, however, to submit memoranda with respect to his motion for a preliminary injunction.

"Following a motion to dismiss filed by the defendants, the plaintiff amended his complaint to challenge the constitutionality of the statutes authorizing the examining board to act. A request to convene a three-judge court and a motion for a temporary restraining order or preliminary injunction were also filed. The defendants amended their motion to dismiss so as to make it applicable to the amended complaint.

"The plaintiff's motion for a temporary restraining order was again denied. Although I believed then, as I do now, that there is a serious question as to the validity of legislation which allows an examining board both to rule on *and* to punish for charges evolving from its own investigation, that question was not presented at that time. The challenge was only to the activity then being engaged in by the board, which was investigation.

"Again, however, the plaintiff was given the opportunity to submit authorities in support of his position, and the defendants were allowed to brief the motion to dismiss. It was anticipated that the arguments presented by the parties would also be helpful toward resolving the question of whether a three-judge court was required.

"Since that time, the status of this action has changed radically. The board is no longer engaged in an investigative proceeding, for it has notified the plaintiff that it has scheduled a 'contested hearing' at which it will determine whether his license should be temporarily suspended. The board's current action makes all allegations of the plaintiff's amended complaint germane. The positions of the parties can no longer be assessed in terms of a limited challenge in-

> volving only investigative proceedings; the board's present action calls into play all challenges to the statutory scheme as detailed in the plaintiff's complaint." *Larkin* v. *Withrow,* 368 F.Supp. 793, 794 (E.D. Wis. 1973).

The appellants, in response to this order of Judge Gordon, did not proceed with their contested hearing, but they did continue their investigative hearing on October 4, 1973. They concluded that hearing on that date and, on October 5, 1973, the appellants issued Findings of Fact and Conclusions of Law. Those findings and conclusions resolve every issue presented in the Notice of Contested Hearing against the appellee, Dr. Larkin. See appellee's appendix.

Subsequently, on November 19, 1973 the three-judge court met and announced from the bench that the Motion for a Preliminary Injunction would be granted. In lieu of Findings of Fact and Conclusions of Law, the three-judge court issued a written decision dated December 21, 1973. *Larkin* v. *Withrow,* 368 F.Supp. 796 (E.D. Wis. 1973). In that decision, the three-judge court stated that the loss to a physician of his right to practice medicine constitutes a loss of his liberty or property. Furthermore, such a person is entitled to procedural due process because of the "significant interference with his property rights or his liberty." *Id.* at p. 797. The court stated:

> "In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly 'a sufficient threat of personal detriment.' Doe v. Bolton, 410 U.S. 179, 188 (1973)." *Ibid.*

The court went on to state that the suspension of a license to practice medicine "presumptively has a serious adverse affect on the physician's reputation. Thus, it is clear that

the plaintiff's liberty is also at stake." *Ibid.* In that language, the court demonstrated its position that there would be irrevocable injury to the appellee. The court noted that there was no exhaustion available in the state courts in the following language:

> "It is true that any action taken by the board pursuant to Sec. 448.18 (7) is subject to judicial review under Sec. 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional." (Emphasis, the court's). *Id.* at p. 798.

The appellants appeal the entry of this interlocutory judgment to the United States Supreme Court.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

The issue involved in this case is whether a state administrative agency can suspend the license of a doctor after it had held an investigative hearing wherein they heard witnesses and concluded that the doctor had violated provisions of the Wisconsin law. This case presents more than some minor mixing of accusatorial and adjudicatorial functions in an administrative agency. This case presents a factual situation where the board conducted a full and complete investigation and had concluded in an *ex parte* hearing that Dr. Larkin had violated the law and then proposed to be the judge of its own accusation in a so-called contested hearing. There is no support in the settled law of the United States for such bias on the part of administrative boards.

In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court overturned the dismissal of a school teacher who had made critical remarks against his Board of Education. It was that same Board of Education which tried this teacher. The issue regarding mixing of functions was raised for the first time on appeal. This Court commented on that issue in the following manner:

> "Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having

raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. *On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant.* Compare Tumey v. Ohio, 273 U.S. 510 (1927); In Re Murchison, 349 U.S. 133 (1955). Accordingly, since the state courts have at no time given de novo consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board." 391 U.S. at p. 578. (Emphasis supplied).

Indeed, the United States Court of Appeals for the Second Circuit in a case involving the expulsion of a cadet from the Merchant Marines Academy stated the obvious proposition of law as follows:

> "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement renders impartiality most difficult to maintain." *Wasson* v. *Trowbridge*, 382 F.2d 807, 813 (2nd Cir. 1967).

Suspension or revocation of a right to practice a profession in a state is comparable to a criminal proceeding. See *In Re Ruffalo*, 390 U.S. 544, 550-551 (1968).[4] Thus, the basic protections required in criminal cases must be granted to Dr. Larkin. One of those basic rights is trial by an impartial fact-finder. With respect to revocation of parole

[4] In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) and *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972), this Court clearly held that a citizen of the United States has a vested right to pursue the common occupations of life and that this right can be protected by a federal civil rights proceeding.

and probation, the Court has held that one of the minimum protections of due process of law is "an independent decision maker." The decision on the merits of the allegations against a parolee or a probationer must be made by someone other than the person who brings the charges. See *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778, 786 (1973).

This case presents a most aggravated attempt to deprive the appellee of due process of law. At the time when the three-judge court entered its preliminary injunction, the appellants in this case had made formal Findings of Fact and Conclusions of Law which resolved every issue in the case against Dr. Larkin. This was done at the conclusion of an *ex parte* hearing. The Board, in that same decision presented the matter to the District Attorney of Milwaukee County with a finding of probable cause that Dr. Larkin had violated the criminal laws of the State of Wisconsin and that his license should be revoked on the basis of their findings of fact. After this decision was made, these appellants then proposed to conduct a so-called Contested Hearing. In that Contested Hearing, the appellants would re-review the evidence and then decide whether the charges which they had previously preferred against Dr. Larkin supported a six (6) month suspension of his license to practice medicine. Thus, the "grand jurors" would become the "petit jurors." None of the other cases which have struck down the mixing of functions in administrative agencies involved such an aggravated fact situation. See *American Cyanide Company* v. *FTC,* 363 F.2d 757 (6th Cir. 1966); *Amos Treat & Co., Inc.* v. *SEC,* 306 F.2d 260 (D.C. 1962); *Mack* v. *Florida State Board of Dentistry,* 296 F.Supp. 1259 (S.D. Fla. 1969), aff. and vac'd. 430 F.2d 862 (5th Cir. 1970); *cert. den.* 401 U.S. 954 (1971); *Trans*

World Airlines v. *CAB*, 254 F.2d 90 (D.C. 1958); *Texaco* v. *FTC*, 336 F.2d 754, 760 (D.C. 1964) and *Glass* v. *Mackie*, 370 Mich. 482, 122 N.W.2d 651 (1963).

The mixing of functions which is present in this case does not even present a close question under the Constitution of the United States. In *In Re Murchison*, 349 U.S. 133 (1955), this Court observed that no state has ever forced a defendant to accept grand jurors as his trial jurors. In unmistakably clear language, this Court stated the fundamental due process right as follows:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatorial process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* at p. 137.

See also *Offutt* v. *United States*, 348 U.S. 11 (1954) and *Bloom* v. *Illinois*, 391 U.S. 194, 202 (1968). This elemental due process admonition which is applicable to judges and juries is equally applicable to administrative agencies which try to revoke and suspend the license of a doctor to practice medicine.

The appellants raise other issues, none of which are substantial.

The appellants claim that the Motion for a Preliminary Injunction did not state the grounds. As pointed out in the Statement of the Case, the Motion contains grounds; there was a Motion for a Preliminary Injunction incorporated with the Amended Complaint; and the letters transmitting the Motion for a Preliminary Injunction clearly set forth the nature of the Motion.

The three-judge court complied with Rule 52(a), FRCP because its memorandum of decision constitutes sufficient Findings of Fact and Conclusions of law.[5]

The appellants complain that there was an administrative remedy available. However, the three-judge court pointed out that there was no effective administrative remedy available because the appeal only determines the propriety of the exercise of the statutory authority of the Board. In this case, the court concluded that the Board itself was improperly constituted. Thus, the appeal is meaningless because the reviewing court would only determine whether there was sufficient evidence to support the findings of the Board, were they allowed to proceed. *Hilboldt* v. *Wis. R. E. Brokers' Bd.*, 28 Wis.2d 474, 482, 137 N.W.2d 482 (1965). The nature of the challenge here is that the Board was biased, and that their findings could not be anything more than a reflection of their bias.[6] This

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[5] If the Court concludes that the opinion of the three-judge court is not specific enough, the remedy is merely a remand to comply with Rule 52(a).

[6] Although the merits of the charges against Dr. Larkin are not at issue at this time, the fact of the matter is that Dr. Larkin has legal and factual defenses to the charges. Section 448.02 (4), Wis. Stats. does not prohibit practicing under a false name. That statute prohibits practicing under a false name after the Board makes a finding, after a hearing "that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the

Court stated in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973):

> "In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a state has instituted administrative proceedings against an individual who then seeks an in-

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(Footnote continued)

public as to identity or to otherwise result in detriment to the profession or the public." The statutory history shows that the State of Wisconsin originally enacted an absolute prohibition against doctors using assumed names. That absolute prohibition was modified by the language quoted above. See History of Sec. 448.02 in Wis. Stats. Annot.

There is no statute prohibiting soliciting patients by means of agents. Indeed, Sec. 448.18 (1)(b) prohibits advertising with respect to venereal diseases and lost manhood or womanhood. No other prohibition against advertising has been found in Chapter 448. Presumably, other forms of advertising are not prohibited in Wisconsin.

Although Sec. 448.02 (1) prohibits the practice of medicine without a license, that statute contains exceptions. Section 448.16, Wis. Stats. states that medical physicians of other states or countries in consultation with resident licensed practitioners do not have to be licensed by the State of Wisconsin. See 1927 Op. of the A.G. of Wisconsin 702, where the Attorney General held that an Illinois physician was not required to obtain a Wisconsin license to practice medicine in Wisconsin in the office of a doctor who was licensed in Wisconsin. Dr. Young Whan Ahn was licensed to practice medicine in the State of Georgia in the fall of 1972, and, upon information and belief was licensed to practice medicine at all times pertinent in the Republic of South Korea. Also, a license is not required for treatment rendered in an emergency. "Emergency" has not been defined by cases in Wisconsin. It is a matter of public record that the Medical Examining Board, in conjunction with the Attorney General and the District Attorney of Milwaukee County threatened the medical profession with punishment if any engaged in the practice of administering abortions in violation of Sec. 940.04, Wis. Stats. They were so successful in their intimidation that only Dr. Kennan and Larkin regularly performed abortions in their clinics

> junction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion or fact-finding is involved. *But this court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983.*" *Id.* at p. 574. (Emphasis supplied)

In addition, this is not a criminal case, and Dr. Larkin had commenced this action in the federal courts *prior to* the commencement of the so-called contested hearing whereby the appellants attempted to suspend his license to practice medicine.

The appellants complain that there was insufficient evidence in the record to support the preliminary injunction. This is a specious claim since the operative facts which

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(Footnote continued)
under protection of the federal courts. Thus, women in need of medical treatment and entitled under the law of medical treatment were turned away by most doctors because of the public threats of these public officials. These same public officials here sought to investigate Dr. Larkin to pass judgment upon his response to the medical emergency which they illegally created.

The so-called fee splitting section, Sec. 448.23 (1), Wis. Stats. is very limited in scope. The statute compels physicians to render an individual statement for his charges even though the physician is working for some institution or organization. The statute does not prohibit a doctor from paying another person money for any reason whatsoever.

The appellants have disqualified themselves from resolving these factual controversies because they were the investigators of Dr. Larkin and, at the time of the entry of the Preliminary Injunction, they had become his formal accusers due to the entry of their Findings of Fact and Conclusions of Law. See appellee's Appendix.

were relied upon by the District Court are uncontested. They are as follows:

1. The appellants investigated Dr. Larkin in an *ex parte* hearing;

2. At the conclusion of this investigative hearing, the appellants made Findings of Fact and Conclusions of Law which resolved the factual issues in the case;

3. The appellants in those Findings of Fact and Conclusions of Law transmitted to the District Attorney of Milwaukee County, Wisconsin a recommendation and finding of probable cause that criminal and civil forfeiture of license proceedings be commenced against Dr. Larkin;

4. The appellants proposed by a Notice of Contested Hearing to try Dr. Larkin upon charges which were identical to the findings which had previously been made and, at the conclusion of that so-called contested hearing to decide whether to suspend Dr. Larkin's license to practice medicine for a period of up to six months;

6. The statutory scheme of the State of Wisconsin contained in Chapter 448 authorizes such proceedings;

6. None of the charges brought against Dr. Larkin at any time challenged his qualifications as a physician to practice medicine in the State of Wisconsin and none of the allegations against him even remotely suggest that he is incompetent to practice medicine in the State of Wisconsin or that his clinic has in any way injured any citizen of the State of Wisconsin due to lack of proper medical treatment.

All of these operative facts were submitted in the form of affidavits or by the Amended Complaint. These operative facts were not in any way challenged by the appellants. The appellants in their brief do not show whether they disagree with any of the operative facts in the case. In fact, they can have no disagreement with any of the operative facts since they are all documented by official records and statutes of Wisconsin.

The appellants complain that the district court did not make a finding of irreparable injury. While those words were not used in the decision by the trial court, it is clear from their opinion that they found that the denial of the right to practice medicine under these circumstances constituted an irreparable injury, and also imposed a loss of reputation in the community which was irreparable. Such grounds were considered adequate with respect to the optometry profession in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). Indeed, it is beyond dispute that the right to practice a profession is a valuable right and its suspension or revocation is an irreparable injury. See *In Re Ruffalo*, 390 U.S. 544 (1968); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Cf. *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Weiman* v. *Updegraff*, 344 U.S. 183 (1952).

Finally, the appellants complain that the court should not have declared the Wisconsin statutory scheme unconstitutional in a preliminary order. While this is technically correct, it is clear that the federal three-judge court concluded that the chances of success by Dr. Larkin were substantial because in their view the statutory scheme as applied in this case was unconstitutional. At best, this is a hypertechnical objection on the part of the appellants and,

if they desired any clarification with respect to the scope of the decision, they were certainly free to request clarification from the district court. They failed to request this clarification, and they thus present themselves in a position where they appear to be more interested in a hypertechnical reversal than in determining the scope of the decision of the United States District Court for the Eastern District of Wisconsin. The opinion of the court did not close the doors of the federal courts to these appellants. They have not demonstrated how they have been in any way harmed by this preliminary injunction.

CONCLUSION

On the basis of the foregoing it is respectfully requested that the Court dismiss or affirm the Preliminary Injunction in this case.

Respectfully submitted,

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